



**THE ATTORNEY GENERAL
OF TEXAS**

October 25, 1988

**JIM MATTOX
ATTORNEY GENERAL**

Mr. Douglas M. Becker
Gray & Becker, Attorneys
At Law
McKean-Eilers Building
323 Congress Avenue
Austin, Texas 78701-4038

Open Records Decision No. 509

Re: Whether the Texas Open Records Act, article 6252-17a, V.T.C.S., applies to the Austin-Travis County Private Industry Council, and, if so, whether the act excepts from disclosure certain information held by the council. (RQ-1371)

Dear Mr. Becker:

The Austin-Travis County Private Industry Council, Inc., received a request under the Texas Open Records Act, article 6252-17a, V.T.C.S., for a copy of a bid proposal. The Open Records Act requires the release of all information held by a "governmental body," as defined in the act, unless the information falls within at least one of the act's specific exceptions to disclosure. See Attorney General Opinion JM-672 (1987). You ask whether the council is a "governmental body" under the act, and, if so, whether section 3(a)(4) of the act protects the bid proposal in question.

The Austin-Travis County Private Industry Council is a non-profit corporation established to administer federal funds granted to the state under the federal Job Training Partnership Act, 29 U.S.C. § 1501 et seq. The purpose of the act is to stimulate training and hiring of undertrained and economically disadvantaged people. To receive federal funds, the state must have a job training plan adopted in compliance with the federal act. 29 U.S.C. §§ 1514, 1515. Under section 1511 of Title 29, the state designates "service delivery areas" consistent with labor markets and consisting of the state or one or more units of general local government. Section 1512 requires the creation of a private industry council for each service delivery area. The council administers the job training plan for its service area in accordance with an agreement or agreements with the chief elected official or officials for the units

of general local government comprising the service delivery area. See 29 U.S.C. § 1513. Additionally, the council must comply with state laws regarding the management of grant funds. See V.T.C.S. art. 4413 (32g); see also V.T.C.S. art. 6252-13e.

Federal law requires that the council consist of a majority of members from the private sector and include members representing educational agencies, organized labor, rehabilitation agencies, economic development agencies, community-based organizations, and public employers. 29 U.S.C. § 1512. These entities or groups nominate representatives who are appointed by a "chief elected official" or "officials" of the general local government or governments comprising the service delivery area. 29 U.S.C. § 1512(d). The council provides policy guidance and oversight for the job training plan "in partnership with the unit or units of general local government within its service delivery area." 29 U.S.C. § 1513(a). The "chief elected officials" of Austin and Travis County also serve on the private industry council. The chief elected officials for the Austin-Travis County Private Industry Council are the Travis County Judge and the Mayor of Austin.

Section 2(1) of the Open Records Act provides that "[g]overnmental body" includes:

(F) the part, section, or portion of every organization, corporation, commission, committee, institution, or agency which is supported in whole or in part by public funds, or which expends public funds. Public funds as used herein shall mean funds of the State of Texas or any governmental subdivision thereof.

The dispositive issue in determining whether a specific entity falls within section 2(1)(F) is whether the entity is supported in whole or in part by public funds or whether it expends public funds. A.H. Belo Corp. v. Southern Methodist University, 734 S.W.2d 720, 723 (Tex. App. - Dallas 1987, writ denied); Attorney General Opinion JM-821 (1987), at 2. Subsection (F), however, defines public funds as "funds of the State of Texas or any governmental subdivision thereof." The council asserts that "the funding expended by the Council is federal money which is simply funnelled through a state agency." The state's role under the Job Training Partnership Act, however, consists of more than merely funneling federal funds to local job training programs.

Romero-Barcelo v. Donovan, 722 F.2d 882, 886 (1st Cir. 1983).

The governor must "certify" the private industry council, 20 C.F.R. § 628.2, and supervise the councils' administration of federal funds granted to the state under the Job Training Partnership Act. See 20 C.F.R. §§ 626-636. The Texas Department of Community Affairs oversees private industry councils. The contract between the Austin-Travis County Private Industry Council and the Department of Community Affairs provides, in paragraph A of section 4, that the state is liable for the council's costs in administering the program within its service delivery area so long as expenditures comply with the federal regulations governing the Job Training Partnership Act. In fact, the department advances state funds when necessary in anticipation of receipt of federal funds and requires a complete accounting of these funds. See Tex. Dept. of Community Affairs Contract for Job Training Partnership Act Programs § 4B. Thus, the private industry council may receive and expend these state funds.

Moreover, because of the manner in which these federal funds are disbursed to the state, it is not clear that they are properly characterized as federal funds. Job training partnership funding is initially distributed to the state and then allocated among local programs. The federal regulations governing the program refer to funds "granted" to the governor, see 20 C.F.R. § 629.31, and to the subsequent distribution of funds as the "[d]istribution of State funds." 20 C.F.R. § 627.21. See General Appropriations Act, Acts 1987, 70th Leg., ch. 78, at 317 (appropriating estimated federal funds to the Department of Community Affairs); see also Open Records Decision No. 268 (1981). Federal funds that are granted to the state or to a political subdivision of the state are often treated as the public funds of the state or political subdivision receiving the funds. See Attorney General Opinions JM-716 (1987) (federal revenue sharing funds); H-777 (1976) (providing that county auditor audits all county funds, including those received under federal grants). The private industry council clearly expends the public funds received by the state through the Job Training Partnership Act. Consequently, private industry councils constitute governmental bodies under section 2(1)(F) of the Open Records Act.

As indicated, the act requires the release of all information held by governmental bodies unless the information falls within at least one of the act's specific

exceptions to disclosure. You suggest that section 3(a)(4) protects the information at issue, a bid proposal, from required disclosure.

Section 3(a)(4) protects "information which, if released, would give advantage to competitors or bidders." Section 3(a)(4) protects the government's purchasing interests by preventing a competitor or bidder on a government contract from gaining unfair advantage over other competitors or bidders. Section 3(a)(4) applies when the release of certain information would cause specific harm in a particular competitive situation. Open Records Decision Nos. 463 (1987); 331, 309 (1982). It does not apply after bidding is over and the contract has been awarded. Open Records Decision No. 406 (1984). Consequently, if the specific contract for which the requested proposal was submitted has been awarded, section 3(a)(4) does not apply.

Bid proposals may, however, contain information protected by section 3(a)(10). See Open Records Decision Nos. 319, 309 (1982). Although you do not expressly claim section 3(a)(10) and this office does not ordinarily consider exceptions not raised by governmental entities, the arguments in your brief raise the issues of trade secret and commercial information protection. For this reason, you have effectively raised section 3(a)(10).

Section 3(a)(10) protects:

trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

Different tests are applicable to trade secrets and to commercial or financial information. Open Records Decision No. 494 (1988).

Your brief asserts that release of the proposal in question would reveal trade secrets. You do not, however, indicate how any of the information meets the Texas courts' tests for trade secrets. See Hyde Corp. v. Huffines, 314 S.W.2d 763 (Tex. 1958); Expo Chemical Co., Inc. v. Brooks, 572 S.W.2d 8 (Tex. Civ. App. - Houston [1st Dist.] 1978) rev'd on other grounds, 576 S.W.2d 369 (Tex. 1979); see also Restatement of Torts, § 757 comment b (1939). The proposal contains general descriptions of the various job training courses to be offered, the course objectives, a line item budget for the course program, a staff time allocation, and a United States Department of Labor Job Training Partnership

Act Participant Planning Summary. None of the information is on its face protected by trade secret. Because you do not demonstrate how it has been maintained as a trade secret, it may not be withheld as such. See Open Records Decision No. 494 (1988).

Section 3(a)(10) protects commercial or financial information if its release to the public would likely 1) impair the government's ability to obtain the information in the future or 2) cause substantial harm to the competitive position of the person from whom the information was obtained. Id. The only information in the proposal at issue that could reasonably be characterized as commercial or financial is the line item budget and the staff time allocation summary. You do not demonstrate how release of this information would impair your ability to obtain the information or cause substantial competitive injury to the company in question.

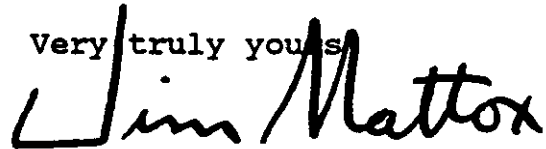
Specifically, you do not indicate how a competitor could effectively "compete" against an entity that is supported with public grant financing. A company that receives government assistance is not in the same competitive position as a private developer. See generally Open Records Decision No. 331 (1982). Because costs, bid specifications, and circumstances will change for future contracts, your suggestion that a competitor could obtain unfair advantage on future contracts is entirely too speculative. Section 3(a)(10) requires more than general allegations of unspecified competitive injury. Open Records Decision No. 494 (1988).

Finally, the Job Training Partnership Act requires that the state develop a specific job training plan for service delivery areas. 29 U.S.C. § 1514, 1515. Each plan must include, among other things, a budget for two program years, 29 U.S.C. § (b)(6), and "a description of the services to be provided, including the estimated duration of service and the estimated training cost per participant." Id. The information in the proposal at issue here is the type of information that must be included in this plan. This office does not understand the council to argue that the plans required by the federal act may be withheld from public disclosure.

S U M M A R Y

The Austin-Travis County Private Industry Council is a "governmental body" within the meaning of section 2(1)(F) of the Texas Open Records Act, article 6252-17a, V.T.C.S. Bid proposals submitted to the council may be withheld under section 3(a)(4) of the Open Records Act only until the contract is awarded. Trade secrets and commercial or financial information may be withheld only when the council demonstrates that tests applicable under section 3(a)(10) are met. The proposal at issue may not be withheld under sections 3(a)(4) or 3(a)(10).

Very truly yours,



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